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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-183

BERNARD SHAPIRO, individually and as Executive Director of the New York State Board of Social Welfare; ABE LAVINE, individually and as Commissioner of the New York State Department of Social Services,

*Appellants,*

*against*

ORGANIZATION OF FOSTER FAMILIES FOR EQUALITY AND REFORM, MADELINE SMITH, RALPH and CHRISTINE GOLDBERG, and GEORGE and DOROTHY LHOTAN, on behalf of themselves and all others similarly situated,

*Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

## STATE APPELLANTS' REPLY BRIEF

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
*Attorney for Appellants*
*Shapiro and Lavine*
Two World Trade Center
New York, New York 10047
Tel. (212) 488-7403

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

MARIA L. MARCUS
MARK C. RUTZICK
Assistant Attorneys General
*Of Counsel*

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## ARGUMENT

Appellees' Motion to Affirm* (p. 20) argues that the state has "no conceivable interest" in opposing the automatic hearings mandated by the District Court. As will be shown below, the motion makes assertions about New

* Hereinafter, "The Motion".

York's foster care system which are wholly unsupported by the record, and indeed are often contradicted by the evidence. Moreover, appellees make no attempt to analyze or rebut state appellants' arguments as to 1) the state's interest in protecting the primacy of family life, and maintaining foster care as a viable service or 2) the adverse effect of the automatic hearing on the foster children themselves.

**1. New York's foster care system, based upon reuniting the family rather than upon conversion of a contractual arrangement into a semi-adoption, is in harmony with due process requirements.**

Appellees argue that removals of children from foster care are "peremptory",* and that such decisions are made by individual social workers who each have different views about the case. The record shows, however, that transfer decisions are made not by the caseworker alone but by a team of child care professionals including a unit supervisor and headed by a casework supervisor who has at a minimum a master's degree in social work.** Changes in the child's plan are not the result of reassignment to a different social worker, but evolve from new circumstances in the life of the child, the natural parents, or the foster parents. See affidavit of Bracha Graber;*** *State ex rel. Wallace* v. *Lhotan,* 51 A.D. 2d 252 (2d Dept., 1976).

Equally inaccurate is appellees' claim that children who are to be transferred are not consulted about the deci-

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* Questions Presented, p. 3.

** The active participation of the supervisor is illustrated by the affidavit of Bracha Graber dated May 28, 1974, and filed in the District Court.

*** *Id.*

sion,* and that the foster children of appellees Lhotan were not "asked whether they wanted to leave their foster home"** prior to their return to their natural mother. As the Appellate Division, Second Department opinion in the *Lhotan* case noted, ". . . the social worker's efforts to encourage Mrs. Lhotan to better the children's relations with their mother have caused a shift from subtle to overt hostility on the part of Mrs. Lhotan and . . . the children now refuse to speak to the social worker." (51 A.D. 2d at 255).

Appellees also cite as "typical of the abuses which could occur and which have occurred under the procedures declared unconstitutional,"*** the case of appellee Madeline Smith. Conspicuously absent from the Motion's account of the *Smith* case is the fact that Mrs. Smith is disabled physically by arthritis and the further fact that Mrs. Smith altered a doctor's report dated February 13, 1974 to the Catholic Guardian Society about her condition, obliterating the last sentence which read, "The patient in my opinion is totally disabled." Also omitted is the fact that she is unable to accompany the children to school and that six-year old Danielle must walk five blocks, crossing main thoroughfares not attended by school crossing guards to reach the school building. Because of Mrs. Smith's physical condition, Eric who is nine years old must go several blocks to the store alone and pick up the family's shopping.****

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* See United States District Court transcript, testimony of Florence Creech and Jane Edwards, dated March 3, 1975, pp. 53, 54, 59, 72, 73, 75, 81, 93.

** Motion, pp. 7-8.

*** P. 5.

**** See affidavit of Bracha Graber, *supra*.

The Motion contends further* that the present procedures governing the foster care program are unconstitutional because the pre-removal conferences rarely result in reversal of the initial decision. It is interesting to note that after the City of New York instituted a pre-removal adversary hearing procedure which could be invoked by foster parents when a child is transferred to a different foster home, only 25 requests for a hearing were received in relation to thousands of transfers in the period from July 1, 1974 to March, 1976. Indeed, 1/6 of all children in New York City who are transferred from a foster home are removed by request of the foster parents themselves.**

**2. The State's interest in protecting the primacy of the family and the best interests of the child underline the adverse effect which would result from the automatic hearings required by the decision below.**

The Motion directs its argument at "contentions"*** never made by appellants, for example that this Court's recent decisions have "narrowed the zone of interests to be accorded due process protection." Appellants had in fact made the opposite point that the ruling in such cases as *Meachum* v. *Fano*, —— U.S. ——, 49 L. Ed. 2d 451 (1976), did not change the law, but merely applied existing constitutional doctrines to reject claims that any "grievous loss" is "sufficient to invoke the procedural protections of the Due Process Clause". Another contention never made by appellants was that "Even if the New York procedures

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* P. 9.

** Affidavit of Carol J. Parry, dated April 7, 1976, filed in the court below.

*** P. 13.

violate the due process rights of foster children, the district court was without jurisdiction . . ."*. The contrary argument was presented by appellants—that since the appellant children and appellant state officials are in agreement as to the constitutionality of the existing procedures, no genuine controversy is presented.

The motion makes no attempt, however, to deal with the positions actually taken in appellants' Jurisdictional Statement: that the State has an interest repeatedly recognized by this Court in establishing and protecting family life; that natural parents would increasingly seek makeshift solutions to child care problems rather than turning to the foster care system, if faced with the threat of losing a child forever once in foster care; that the fiscal and administrative burden to New York of providing more than two thousand hearings is substantial; that children would be hurt by adversary hearings and by the uncertainties and protracted delays involved in judicial review of such hearings, as well as by being locked into unsuitable foster homes; and that an automatic hearing poses a grave temptation to foster parents to use their enormous influence over the child living with them to persuade him to "prefer" them to his own parents. See the Appellate Division opinion in *Lhotan* (51 A D 2d at 253-255):

> "On September 4, 1970, the petitioner voluntarily placed her six children in foster care. At the time she was unable to care for them and had severe emotional problems consistent with post partum depression. . . . The children were never surrendered for adoption and were never intended by the petitioner to be abandoned or permanently alienated . . .
>
> "In December, 1972 the petitioner's condition improved and the boys were returned to her after the Department determined that she was able to care for them. Follow-up visits by Department personnel have

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* P. 13.

shown that the boys are doing very well with the petitioner; no one now questions that she has been a loving and fit mother for the three years that have elapsed since then. . . .

"The Department's records note that, before Cathleen's and Cynthia's removal from the Dunnes to the Lhotans, they had a 'fair relationship' with their mother. After the transfer, the attitude of these two children towards their mother materially deteriorated to a point where they now say that they do not want to see her. . . .

"Numerous visits to the Lhotan home persuaded the social worker that Mrs. Lhotan was not co-operating with the Department to help the children overcome their negative feelings about their mother. The trial record amply supports this view and the Trial Justice so found.

• • •

"On May 22, 1974 the Department referred the matter for a psychiatric evaluation. On June 17, 1974 an 'interdisciplinary conference' was held, attended by professional people of broad experience who had studied the problems of these children. The professionals included (1) Dr. Allen Reichman, a psychiatrist (who had previously interviewed the petitioner and Cynthia, on the basis of which he determined that the petitioner was able to care for the children and that Cynthia 'sort of rattled • • • off [her complaints about her mother] as if they had been rehearsed'; it was his opinion that she was relating something that had been told to her); (2) Dr. Irving Solomon, a diplomate in clinical psychology and a certified psychiatrist (who previously examined Cathleen, whose grievances [he said] sounded rehearsed; it was his opinion that she felt that to accept her mother would be a violation of loyalty to the Lhotans); (3) Roslyn Kantor, a psychi-

> atric social worker; and (4) Estelle Rapoport, a staff psychologist (who had examined Cathleen by Rorschach and thematic apperception tests and found that she appeared to be controlled by others)."

As conceded in the Motion (p. 3), the only arguments in support of the "rights" enunciated by the court below "were advanced by appellee foster parents."* In view of the adverse impact of the District Court decision on the children, the natural parents, the State, and the City, as well as the resultant conflict with this Court's prior Due Process Clause holdings, plenary review by this Court is essential.

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* Since relief was accorded to the children and not the foster parents, and since the foster parents' interests conflict with those of the children (see District Court opinion, Appendix G), obvious problems of standing are raised by the majority decision below. The cases on standing referred to in the Motion (pp. 24-25), are patently inapplicable herein. They involve organizations or persons seeking rights for their members or third parties (rather than for a class with a conflict of interest such as in the case at bar), or plaintiffs who have sought judicial assistance to remedy a legal wrong (rather than plaintiffs such as the children here who consistently assert that no legal wrong has been done). Indeed, two of the cases cited on this point in the Motion support appellants, not appellees; see *Sierra Club* v. *Morton*, 405 U.S. 727 (1972), and *Warth* v. *Seldin*, 422 U.S. 490 (1975).

## CONCLUSION

**For the foregoing reasons it is respectfully requested that this Court deny the motion to affirm, note probable jurisdiction and grant plenary consideration to the instant appeal.**

Dated: New York, New York,
September 16, 1976.

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
*Attorney for Appellants*
*Shapiro and Lavine*

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

MARIA L. MARCUS
MARK C. RUTZICK
Assistant Attorneys General
*Of Counsel*